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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 27

FEDERAL TRADE COMMISSION, *Petitioner*

v.

FRED MEYER, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D.C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon 97204

Attorneys for Respondents

Of Counsel:

HOWREY, SIMON, BAKER
& MURCHISON
1707 H Street, Northwest

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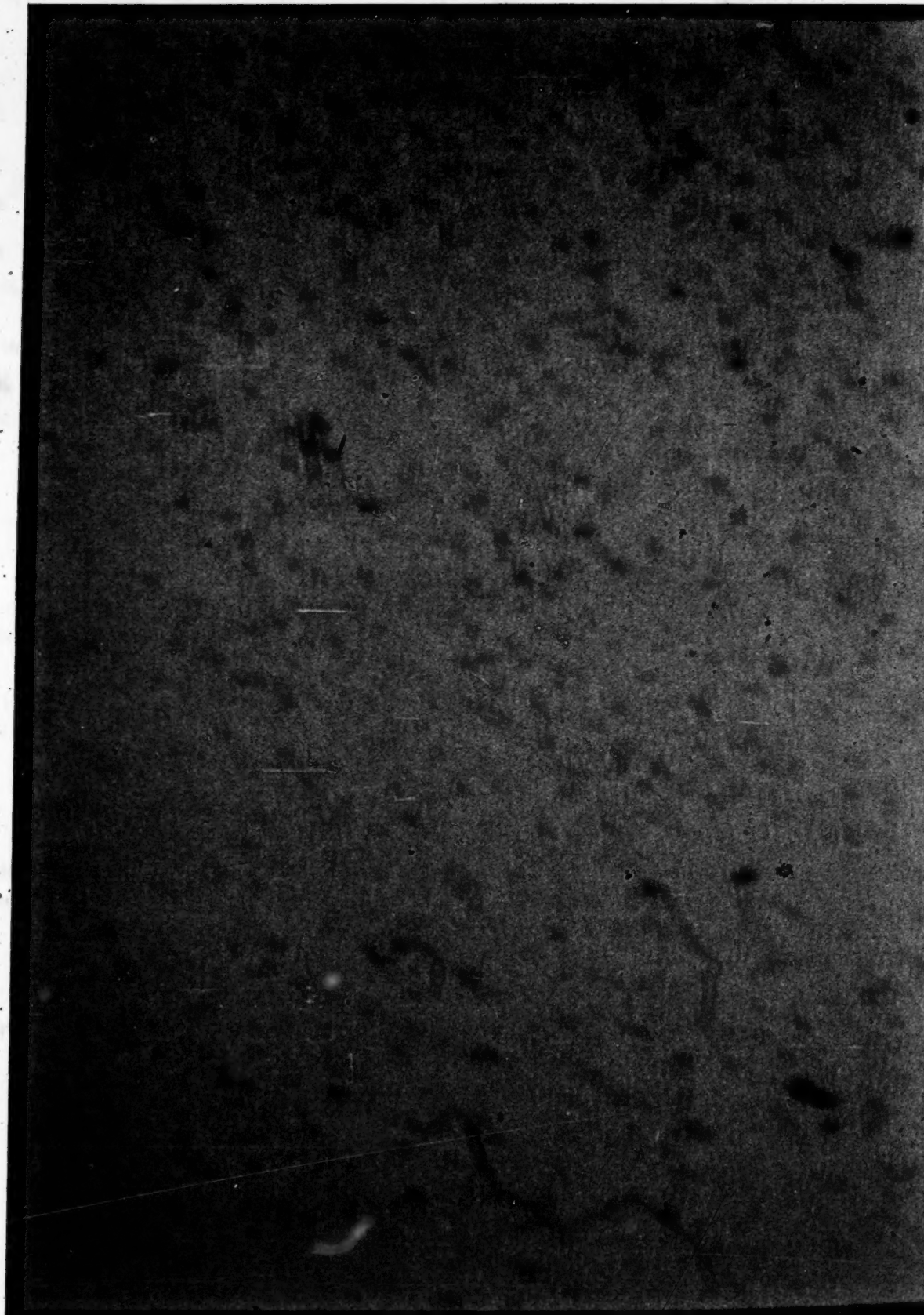

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, requires a supplier, when it grants a promotional allowance to one customer, to proportionalize the promotional allowance among other customers which operate at functionally different and distinct levels of distribution and do not compete in the resale of such supplier's products.

2. Whether the present record provides a proper or adequate basis for reaching a meaningful and informed determination of the question presented.

STATEMENT

The Federal Trade Commission (Commission) asks this Court to reverse that portion of the judgment of the court of appeals which set aside the Commission's holding that respondents (hereinafter collectively referred to as "Meyer"), a retail grocery corporation and two of its officers, violated Section 5(a) of the Federal Trade Commission Act, as amended, 66 Stat. 632, 15 U.S.C. § 45(a), by knowingly inducing promotional allowances of $350 from two of its suppliers which were not granted to two of those suppliers' wholesale customers.

The complaint against Meyer was issued on May 15, 1959 (R. 1-7). For a quarter of a century following passage of the Robinson-Patman Act, and at the time of issuance of the complaint, it was accepted law that Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(d), requires a supplier to grant promotional allowances on proportionally equal terms *only* to those of its customers which compete at the same functional level in the resale of the goods involved. On September 9, 1959, while the instant case was still in hearings, this construction of the statute was reaffirmed by the Commission in its opinion in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-252 (1959). However, when the case reached the Commission in March 1963, the Commission declined to follow its prior construction of the statute, specifically reversed its *Liggett & Myers* holding, and held that Section 2(d) requires that a supplier grant or make available on proportionally equal terms to its *wholesale* customers any promotional allowances it grants to direct-buying *retail* customers,

where the customers to whom the wholesaler resells compete with the direct-buying retailer (R. 66). While conceding that the products of the suppliers granting the allowances had not been shown to have actually reached the shelves of the retailer-customers of the two wholesalers, the Commission held that competition between Meyer and the retailer-customers of the wholesalers in the resale of those products had nonetheless been established (R. 66-67).

Reversing the Commission's holding on this wholesaler-retailer issue, the court of appeals declined to interpret the "customers competing" language of Section 2(d) as embracing customers operating at different and distinct functional levels and followed the long-standing and presumably settled construction of the statute, *viz.*, that the obligation of a supplier who grants a promotional allowance to one customer is limited to proportionalizing that allowance among such other customers as are in actual competition at the same functional level (R. 124, 128, 130-131). In order to find a Section 2(d) violation based on the granting of disproportionate allowances as between retailers and wholesalers, the court of appeals said, it must be shown (1) that the retail customers to whom the wholesaler resells are "indirect" customers of the supplier granting the allowance, *i.e.*, that such supplier engages in a course of direct dealing with the wholesalers' customers, and (2) that those "indirect" customers in fact compete with the favored direct-buying retailer in the resale of the product involved (R. 124, 128, 130-131). The court of appeals found the proof insufficient to establish either of the two requisites.

SUMMARY OF ARGUMENT

The Commission's construction of Section 2(d) is in conflict with the logical and the congressionally intended meaning of that section. Section 2(d) prohibits discrimination in the payment of promotional allowances between "customers competing in the distribution" of the goods concerning which the allowance is made. Retailers distribute goods only to consumers and compete only with other retailers in this "distribution" function. Wholesalers distribute goods only to retailers and compete only with other wholesalers in their "distribution" function. Accordingly, without direct and convincing evidence of a contrary legislative intent, it must be assumed that Congress meant the "customers competing in the distribution" language of Section 2(d) to embrace only such reseller customers of a supplier as actually compete at the same functional level, *i.e.*, resellers that actually vie with one another for the patronage of the same customers.

There is no direct evidence that Congress intended to broaden the concept of Section 2(d) to reach "discrimination" between customers operating at different and distinct functional levels and, therefore, not engaged in competition with each other. Read in context with the other sections of the Robinson-Patman Act, the evidence of congressional intent is clearly to the contrary. Where Congress intended to prohibit discrimination between customers occupying different functional levels in the distribution system, it did so in express and specific terms. In Section 2(a) of the Act, Congress thus prohibited price discrimination which may "injure, destroy, or prevent competition with any person who either grants or knowingly re-

ceives the benefit of such discrimination, *or with customers of either of them"* (emphasis added). On the basis of this specific language, a supplier who discriminates in price against a wholesale customer and in favor of a direct-buying retail customer may be found to be in violation of Section 2(a) where the discrimination adversely affects competition between the direct-buying retailer and the retailer-customers of the wholesaler. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948). *No such language appears in Section 2(d).*

Thus, Congress expressly demonstrated in Section 2(a) of the Act that it knew how to expand the applicable concept of competition beyond a single functional level. It must be concluded that like clarity of expression would be present in Section 2(d) if Congress had intended to expand the applicable concept of competition in that section in the same manner as it did in 2(a). See *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 514-515 (1963). The legislative history of the Robinson-Patman Act, moreover, demonstrates that this was not Congress' intention and that Section 2(d) was deliberately drafted more narrowly than Section 2(a).

Further, in order to establish a violation of Section 2(a), a reasonable probability of competitive injury must be shown, and one charged with such violation is expressly allowed certain affirmative defenses and justifications. However, with the exception of the meeting competition defense, Congress made the prohibitions of Section 2(d) absolute. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Because of the very nature of *per se* of-

fenses, statutes containing such absolute prohibitions should be strictly construed. It therefore cannot be inferred that Congress meant by its silence to include by way of construction of 2(d) something which it specifically included in 2(a), a non-*per se* section.

It must be assumed that in enacting Section 2(d), Congress intended to achieve an effective and operable result. The section should not, therefore, be given a construction which would be totally impracticable in operation and would render its application realistically and economically impossible. The entire rationale of the Commission's position is that, unless wholesalers receive promotional allowances proportionate to those granted direct-buying retail customers, the retailer customers of the wholesaler will be deprived of equivalent benefits and will thereby be disadvantaged. This necessarily means that the allowance must be passed from the wholesaler to his retail customers. Wholesalers, however, are neither capable nor desirous of assuming the inescapable and innumerable burdens necessarily incident to passing on either promotional allowances or promotional benefits to their customers. And to grant an allowance to a wholesaler under the conditions that he do so would not only be futile but would likely be contrary to the broader objectives of the Sherman and Federal Trade Commission Acts. On the other hand, granting windfall promotional allowances to wholesale customers for use in connection with their own function would not inure to the benefit of the retailer-customers of the wholesaler, thus defeating the avowed purpose of the Commission's construction.

The burdens, practical difficulties and legal problems which would result from adoption of the Commission's construction, make clear that such construction could not have been intended by Congress. Administration of any promotional program by a supplier which is required to deal with retail and wholesale customers on equal promotional and advertising terms would prove far too costly to make it worth the value received. Consequently, adoption of the Commission's construction would result in one of three undesirable consequences, none of which Congress could have intended. Suppliers would be compelled to cease offering cooperative promotional programs to customers, or to increase the prices of their goods in order to compensate for the increased costs of administering the cooperative promotional programs, or to cease dealing through the wholesale distribution channel altogether.

Finally, in view of the critical importance of the issue presented, it should not be decided on the record of this case. The complaint against Meyer did not directly raise the issue and, under the state of the law at the time of trial, it appeared settled that, where the alleged discrimination was between wholesale and retail customers, it was necessary only to establish that fact and the matter was ended. Accordingly, no record exists which will allow the necessary thorough analysis of all pertinent facts and considerations, or which will provide an adequate or proper basis for reaching an informed and meaningful determination.

ARGUMENT

I. SECTION 2(d) OF THE ROBINSON-PATMAN ACT CANNOT BE CONSTRUED TO REQUIRE SUPPLIERS TO PROPORTIONALIZE PROMOTIONAL PAYMENTS AMONG CUSTOMERS OPERATING AT DIFFERENT AND DISTINCT FUNCTIONAL LEVELS OF DISTRIBUTION

Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(d), provides:

> (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other *customers competing in the distribution* of such products or commodities (emphasis added).

The issue before this Court is the correct and congressionally intended meaning of the italicized language — "customers competing in the distribution." Following the logical and long-standing construction of the statute, the court of appeals held that the prohibition of Section 2(d) applies only to discrimination among customers operating and competing at the same functional level of distribution and that no violation occurs where allowances granted to a direct-buying retailer are not granted to a wholesaler (R. 130-131). The Commission, on the other hand, argues that the italicized language embraces *all* participants in the *entire* system of distribution of goods from manu-

facturer to consumer; that Section 2(d) must be construed as requiring a supplier that grants promotional allowances to one customer (here a retailer) to grant proportionally equal allowances to all other customers participating in the system (wholesalers here)—regardless of the diverse and distinct functions those other customers perform—if somewhere in the tier of distribution the recipient of the allowances competes with customers of another direct-buying customer.

A. The Commission's Construction is Contrary to the Logical and the Congressionally Intended Meaning of Section 2(d)

It is a basic principle of statutory construction that where no ambiguity exists in the language of a statute, no need for interpretation arises, *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917). The validity of the construction proposed by the Commission, therefore, must first be tested by the language Congress utilized in prohibiting discrimination in promotional allowances.

Different classes of customers, of course, engage in different and distinct functions in performing their respective roles. A retailer, quite clearly, "distributes" goods only to consumers; the traditional wholesaler, on the other hand, "distributes" goods only to retailers who in turn "distribute" to consumers. In this sense, "distribute" is synonomous with "resale;" and, within the usual and common meaning of the terms of 2(d), a retailer competes only with other retailers in its limited function of vying for the patronage of consumers. This construction has not only the support of logic, but when Section 2(d) is considered in the context of the other sections of

the Robinson-Patman Act, it is clear that it is the construction intended by Congress.

Each section of the Act was directed, conceptually and actually, at a different discriminatory practice. Section 2(a), generally considered the core of the Act, sought to prevent discrimination in the form of different prices—the most obvious form of discrimination. A discriminatory concession falls within 2(a) if it is made in connection with or to induce the *original sale* of the goods involved, *i.e.*, the sale by a supplier to a direct-buying customer; it is not conditioned upon the furnishing of services by the customer. *New England Confectionery Co.*, 46 F.T.C. 1041, 1059-1060 (1949). See also Rowe, *Price Discrimination Under the Robinson-Patman Act*, 103-105, 107, 376-381 (1962) [hereinafter "Rowe"]. Section 2(c) also sought to prevent discrimination in the form of price concessions but was directed specifically at concessions granted under the guise of unearned "brokerage" or "commissions." This section, too, reaches concessions made in connection with the *original sale* of the goods involved. In contrast, Sections 2(d) and 2(e) were specifically drafted and designed to prevent discrimination, not in prices, but in the granting of promotional and advertising allowances, services and facilities. Section 2(d), indeed, governs promotional and advertising arrangements to the exclusion of other arrangements, and applies only where allowances are made "as compensation or in consideration for" the furnishing of promotional services by a customer in connection with that customer's *resale* of the goods involved. *New England Confectionery Co., supra*, at 1059-1060; *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581,

602 (1951); *General Foods Corp.*, 52 F.T.C. 798, 822, 828 (1956); *Russellville Can Co.* v. *American Can Co.*, 191 F. 2d 38, 56 (8th Cir. 1951); *R. H. Macy & Co.* v. *Federal Trade Commission*, 326 F. 2d 445, 448-450 (2d Cir. 1964). *Cf., Skinner* v. *United States Steel Corp.*, 233 F. 2d 762, 765 (5th Cir., 1956); *Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959). See also Rowe, 107, 370-372, 376-381.

The Section 2(d) concept of discrimination is thus more limited than that of Section 2(a); in the Commission's words, Section 2(d) "is in itself a very narrow definition of an illegal practice" and "is much narrower in scope than Section 2(a)." *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 578 (1962). Consistent with the narrow and specific type of *practice* at which 2(d) was pointed, Congress also selected language appropriately designed to reflect and limit the *competition* which Section 2(d) was intended to protect, *viz.*, competition between customers actually competing with one another in the distribution of a supplier's goods. Had Congress intended to expand this applicable concept of competition in Section 2(d) beyond a single level of distribution, as the Commission argues, it could easily have done so—and would have done so—by the use of different language, such as that contained in Section 2(a) of the Act.

In Section 2(a), Congress prohibited price discriminations which may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*" (emphasis added). On the basis of this specific language, a supplier who discriminates in price against a wholesale

customer and in favor of a direct-buying retail customer may be found to have violated Section 2(a) where the retailer-customers of the wholesaler compete with the direct-buying retailer. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948). Such a discrimination, however, is within the prohibition of Section 2(a) because Congress specifically and deliberately so provided (*Ibid.*). *Congress did not do so in Section (2d).*

The Commission argues that the specific language of Section 2(a), "although it supported the Court's conclusion in *Morton Salt, supra,* that the 'difference' between the price charged the favored retailer and the nonfavored wholesalers amounted to a price 'discrimination,' was not essential to it," and that the result reached in *Morton Salt* would have been the same "if the draftsman of Section 2(a), while retaining its present description of the offense of 'discrimination,' i.e., 'discriminate in price between different purchasers,' had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (R. 64-65; Pet. Brief, p. 27, n. 22). This argument is patently unsound; for this, as the legislative history shows, is precisely what Congress deliberately did *not* do in Section 2(a).

In enacting the Robinson-Patman Act in 1936, Congress was alert to the necessity of explicitness in stating the applicable concept of competition which it sought to invoke. Prior to the Robinson-Patman amendments, substantial question had arisen as to the intended distributional level coverage of the original price discrimination section of the Clayton Act (38

Stat. 730).[1] When originally presented in 1935, neither the original Robinson bill[2] nor the original Patman bill[3] contained the clause relied upon in *Morton Salt, supra,* to support the application of Section 2(a) to a supplier's charging a direct-buying retail customer a price lower than that charged a wholesale customer. Both the Senate and the House Committee to which the bills were referred, however, believed the language should be added in order to broaden the "jurisdictional scope" of Section 2(a) and to make explicit the competition it sought to protect. The added language, explained the House Committee,

> . . . accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination . . . . Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protec-

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[1] In the early 1920's, the Second Circuit had interpreted Section 2 of the Clayton Act as being inapplicable where the prejudicial competitive effects occurred only at the buyer level. *National Biscuit Co.* v. *Federal Trade Commission,* 299 Fed. 733 (2d Cir. 1924); *Mennen Co.* v. *Federal Trade Commission,* 288 Fed. 774 (2d Cir. 1923). This interpretation was later repudiated by the Supreme Court. *George Van Camp & Sons Co.* v. *American Can Co.,* 278 U.S. 245 (1929).

[2] S. 3154, 74th Cong., 1st Sess. (June 26, 1935).

[3] H.R. 8442, 74th Cong., 1st Sess. (June 11, 1935).

> tion of the public interest at the same time is achieved.[4]

While thus broadening the applicable concept of competition of Section 2(a), both the Senate and the House Committee left the more restrictive language of the promotional allowance sections of the respective bills intact. Both sections (Section 2(c) of the Senate bill and Section 2(d) of the House bill) prohibited, as does the enacted version, the payment of promotional allowances to one customer unless available "on proportionally equal terms to all other *customers competing in the distribution*" of the goods involved. The purpose of the section, the Committees explained, was to prohibit the payment of promotional allowances to one customer which *"his smaller competitor"* is unable to command. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936). The section, the House report continued, "address[es] this evil by prohibiting the granting of such allowances . . . except when accorded or made available to all *competing customers* on proportionally equal terms" (emphasis added). H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). Consistent with its expression that the section was designed to place actually competing customers—i.e., customers competing at the same functional level—on equal footing, the House Commitee then stated (*Ibid.*):

> To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manu-

[4] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). The Senate Committee report explained the purpose of adding the broadening language in almost identical terms. S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

> facturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, *a competing customer with a smaller number of stores,* but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis (emphasis added).[5]

This Court observed in *Federal Trade Commission* v. *Sun Oil Co.,* 371 U.S. 505, 514-515 (1963), that where Congress in the Robinson-Patman Act intended to expand the meaning of "competition" beyond that between customers occupying a single functional level it knew precisely how to do so. There, the Court held that the term "competitor," as used in the Section 2(b) "meeting competition" proviso of the Act, cannot be construed as meaning one operating at a functional level different from that of the discriminator. The reasoning of the Court in so holding is fully applicable here:

> Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act [Section 2(a)] that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2(b) the same broad meaning of competition or com-

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[5] The Senate Committee used the same illustration. S. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936).

petitor which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary.

Nor is there any reason to assume that Congress intended to invoke by omission in *(2)d* the same broad meaning of competition which it explicitly provided in 2(a). Here, too, the reasonable inference is quite the contrary.[6]

Despite all this, the Commission, while acknowledging the differences in the language of Sections 2(a) and 2(d), asserts that this difference "demonstrates, if anything, that Congress wished the prohibition of Section 2(d) to be interpreted more *broadly,* not more narrowly, than that contained in Section 2(a) . . ." (Pet. Brief, pp. 27-28). This, according to the Commission, is evidenced by the fact that Congress made 2(d) a *per se* section. This very fact, however, precludes any inference that the 2(d) prohibitions were meant to be more broadly applied than those of 2(a).

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[6] The Commission argues that the *Sun Oil* holding has no application to the issue here because the "statutory provisions and policy considerations involved in *Sun Oil* are obviously quite different . . ." (Pet. Brief, p. 16, n. 12). The *statutory construction principle* for which *Sun Oil* stands, however, is quite obviously applicable.

Sun Oil Company argued that Section 2(b) should be construed to allow a gasoline refiner to meet the price of a competitor of its retail customer since its retail customer served merely as a conduit in the distribution of gasoline from refiner to consumer. Here, the Commission's argument is similarly structured; it argues that the 2(d) concept of competition is broad enough to require a manufacturer to grant wholesale customers promotional allowances granted retail customers because the wholesaler is merely a conduit in the distribution of the manufacturer's goods to the consumer. Clearly, the Court's *Sun Oil* statutory construction rationale in rejecting this "conduit theory" interpretation of 2(b) precludes such an interpretation of 2(d).

In order to establish a violation of Section 2(a), it is necessary to show a reasonable probability of competitive injury, and a supplier charged with such violation is expressly allowed certain affirmative defenses and justifications. It may defend on the basis that the lower price was given to meet competition; that the price was cost justified; or that it was in response to changing conditions, such as deterioration of perishable goods, obsolescence of seasonal goods, distress sales, and sales in discontinuing a line of goods. With the exception of the meeting competition defense, however, Congress made the prohibitions of 2(d) absolute; competitive injury need not be shown and none of the justifications available under 2(a) are applicable. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Because of the very nature of *per se* offenses, and the absence of any opportunity for affirmative defense or justification, plus the fact that the Commission is relieved of the burden of showing competitive injury, it cannot be inferred that Congress meant by its silence to include by way of construction of 2(d) something which it specifically included in 2(a), a non *per se* section.[7] As stated in *Simplicity Pattern, supra,*

[7] Contrary to its argument here that 2(d) must be given a broad interpretation (Pet. Brief, pp. 27-28), the Commission itself has recognized that 2(d) "is in itself a very narrow definition of an illegal practice" and "is much narrower in scope than Section 2(a)." *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 578 (1962). The very rationale supporting a *per se* application to 2(d) is that it describes a specific and narrow practice which Congress deemed "always led to the undesired effects on competition." *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92, 99 (2d Cir. 1962). Before the Commission's holding in this case, it had been uniformly accepted that the undesired effects which "inevitably" flow from a discrimination in promotional allowances result only when the discrimination occurs between customers in actual competition at the same functional level. See note 23, p. 30, *infra*.

the courts "cannot supply what Congress has studiously omitted." 360 U.S. at 67.

The Commission's protestations that the court of appeals' ruling "would create a serious loophole in the enforcement of the Robinson-Patman Act" (Pet. Brief, p. 13) cannot be taken seriously. For twenty-seven years prior to this case, the Commission administered Section 2(d) under the same construction as that applied by the court below. Obviously, the Commission never before believed that construction created a "serious loophole" in the Act's enforcement. The Commission's assertion that effective enforcement is dependent upon the construction it now urges must therefore be taken for what it is—an assertion without basis in fact or economic need. This Court's answer to a similar contention of the Commission in *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349, 351-352 (1941), is apposite.

> That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by a general statutory language, so *the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred* (footnote omitted; emphasis added).

The foregoing, we believe, demonstrates that Congress deliberately refrained from broadening the applicable concept of competition and "discrimination" in Section 2(d) to require suppliers to deal with re-

tail and wholesale customers on equal promotional and advertising terms. As shown below, Congress' election to limit the reach of 2(d), instead, only to discriminations between customers engaged and actually competing at the same functional level is supported by the economically distinct functions the various customer classes perform in the distribution system.[8] But even were this not so, this Court's caution against reading something into the Act which is not expressed must be borne in mind: "Entirely aside from the fact that this Court is not in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price and other discriminations differently is without a rational basis." *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67-68 (1959).

B. The Commission's Construction is Impracticable in Operation and Impossible of Application

It must be assumed that in enacting Section 2(d), Congress intended to achieve an effective and operable result. It cannot, therefore, be given a construction which would be impracticable in operation and which would render its application realistically and economically impossible. This, however, is precisely what the Commission proposes.

The practical difficulties inherent in attempting to apply the stringent Section 2(d) requirement of proportional equality to functionally distinct customer

[8] The Robinson-Patman Act was designed to allow for just such differences. The object of the Act, as stated by both the House and the Senate Committee, was to "suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences in their business positions* . . ." (emphasis added). H.R. Rep. No. 2287, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

classes are innumerable and insuperable. Only a most superficial and uninformed analysis of the problems would lead to any other conclusion. In its brief in opposition to the Commission's cross-petition for a writ of certiorari, Meyer set forth some of the many practical considerations which demonstrate the incongruity of the Commission's proposed construction. The Commission refers to these as "hypothetical situations" and attempts to show that no operational or administrative difficulties would be posed under its proposed construction of 2(d). This attempt, however, suggests not only a surprising naivete but openly demonstrates just the type of conflicts which Meyer claims will result should the Commission's construction be adopted.

The underlying rationale of the Commission's position is that, unless wholesalers receive promotional payments, the retailer-customers of the wholesalers will be disadvantaged. This means, of course, that the allowance, in one form or another, must be passed on to the retailer. But it is impossible to accomplish this objective within the framework of Section 2(d) without destroying the independent status of wholesalers, without running headlong into the prohibitions of the other antitrust laws, and without burdening both suppliers and wholesalers with wholly unrealistic, uneconomic and impossible tasks.

The Commission's answer to this runs the spectrum from absolute impracticability to what would appear direct violations of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. § 1. If a direct-buying retailer is given an allowance for in-store promotion, for example, the

Commission asserts that Section 2(d) could be satisfied by "offering a similar allowance to the wholesaler upon terms requiring him to pass on an appropriate share to those of his retailer customers who will in turn perform similar in-store promotions" (Pet. Brief p. 31). The Commission does not attempt to answer the initial question of whether a wholesaler would be willing or able to assume the inescapable burdens inherent in such a promotional scheme, which would necessarily include: (1) determining which of his retailer-customers (frequently several hundred in number) compete with the direct-buying retailer and are, therefore, entitled to participate;[9] (2) determining which of these entitled customers wish to participate;[10] (3) determining exactly what portion of the allowance each participating customer is entitled to receive;[11] (4) con-

[9] Only such of the wholesaler's customers as are in actual competition with the direct-buying retailer would be entitled to receive the promotional benefits. See FTC's 1960 Guides for Advertising Allowances and Other Merchandising Payments and Services, Pars. 9 and 12, 1 CCH Trade Reg. Rep. ¶3980, at pp. 6077, 6078. [These Guides are printed in pertinent part in the Appendix of the Brief for the Federal Trade Commission, pp. 41-48, and for convenience are hereinafter cited to that Appendix.] Were a supplier, even indirectly, to provide promotional allowances to customers not in such competition, the allowance, under the Commission's theory, would itself violate Section 2(d).

[10] Action must be taken "to inform all . . . customers competing with any participating customer that the plan is available." FTC Guides, Par. 8, Pet. Brief Appendix, p. 44.

[11] To comply with Section 2(d), the allowance must, of course, be proportionalized. This requires, in turn, an analysis of each customer's purchases, requiring examination of perhaps thousands of invoices, and a basing of the amount of the allowance "on the dollar volume or on the quantity of goods purchased during a specified time." FTC Guides, Par. 7, Pet. Brief Appendix, p. 43.

structing a usable program to fit each participating customer's particular business;[12] (5) processing retailer claims for reimbursement; (6) assuring and collecting proof that the promotional activity has actually been performed by the retailer-customer;[13] (7) reimbursing the retailer-customers for the amount actually expended;[14] (8) submitting the proof of customer performance to the supplier; and, finally, (9) collecting the amount due the wholesaler from the supplier.

These burdens which would necessarily be imposed upon a wholesaler if given an allowance "upon terms requiring him to pass on an appropriate share" to his retailer-customers, as the Commission suggests (Pet. Brief, p. 31), vividly demonstrate the impracticability of the Commission's construction, as well as the futility of offering an allowance to a wholesaler on the condition that he pass it along to his customers. No whole-

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[12] A promotional plan "must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers. This may require offering all customers more than one way to participate in the plan." FTC Guides, Par. 9, Pet. Brief Appendix, p. 44.

[13] "[T]he customer must expend the value received in full solely for the purpose for which the allowances were given." And both the supplier and the wholesaler would be obligated to assure that the allowances are actually used for the intended purpose. FTC Guides, Par. 11, Pet. Brief Appendix, pp. 45-46.

[14] "[A] seller may not properly pay, nor may a customer properly receive and retain, any amount in excess of that actually used by the customer to perform the service." FTC Guides, Par. 11, Pet. Brief Appendix, p. 46.

saler, we submit, would be interested in or capable of assuming the necessary burdens. [15]

But the difficulties do not end here; for, as a practical matter, wholesalers do not conduct their businesses or maintain their records in such a manner as would allow them to judge entitlement, proportionality, nature of program, etc., under the stringent requirements laid down by the Commission. For a wholesaler to be in a position to accept promotional allowances, therefore, he would undoubtedly be compelled to change his whole method of doing business. The effort and expense of doing this, together with the administrative expenses he would necessarily incur in properly administering a promotional plan offered for the benefit of his retailer-customers, would quite obviously be substantial. In order to withstand this expense, the wholesaler would have but two alternatives: (1) increase the price of his goods to his retailer-customers; or (2) look to the supplier to absorb the costs incurred in administering the promotional plan. The first, of course, would result in the very disadvantage to the retailer-customers which the Commission seeks to eliminate; and the second would place the supplier in a position of discriminating against its direct-buying retailers if, in fact, the supplier paid the wholesaler's expenses.

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[15] While the record is otherwise barren on these practical issues, one wholesaler witness testified that his company "would not have been interested in an advertising allowance as such, for our Wadham's brand" since it would demand "that we perform a function of advertising, which requires an expenditure of money" and "[n]one of our stores would have been interested in advertising the Wadham's grade of corn . . . " (see Transcript of Record printed for use before the court of appeals, pp. 272-273).

Furthermore, if a supplier were to grant allowances to a wholesaler under the conditions suggested by the Commission, *i.e.*, "upon terms requiring [the wholesaler] to pass on" the allowances (Pet. Brief, p. 31), a serious question would arise as to whether the supplier is imposing such restriction and control as to constitute an unlawful tampering with the wholesaler's terms and conditions of resale, a matter within the *per se* prohibitions of both Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.[16]

The Commission next suggests that where a direct-buying retailer is given an allowance for advertising the availability in its stores of products purchased from the supplier, Section 2(d) might be satisfied by offering a similar allowance to the wholesaler "upon terms requiring him to publish similar advertisements of the availability of the supplier's products in his retailer customers' stores" (Pet. Brief, p. 32). This too is replete with practical and legal difficulties. In the retail grocery field, for example,—and in many other fields as well—a retailer's advertising is almost universally both product and price advertising. Is the Commission proposing that it would be proper for a supplier to make an allowance, requiring assurance and proof of performance, to facilitate a common ad-

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[16] See *e.g.*, *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

vertisement by competitors relating to what, by necessity, must be a common price?[17]

The Commission's next suggestion is that, if the wholesaler prefers, the supplier itself might assume the burden of dealing with the wholesaler's customers directly (Pet. Brief, pp. 32; 34, n. 29). This highlights even further the impracticability of the Commission's proposed construction. As the Commission acknowledges (Pet. Brief, p. 32), the supplier normally does not know the identity of many—if any—of its wholesaler's retail customers. Thus, the supplier's first task would be to determine the identity of such customers as are in competition with the direct-buying retailer to whom an allowance was to be made.[18] The supplier would then have to determine which of these customers are purchasers of the goods involved, the amount

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[17] The newspaper advertisement would necessarily be a common advertisement. If an allowance is granted a direct-buying retailer for the purpose of running a newspaper advertisement, the supplier cannot lawfully or practicably grant a wholesaler an allowance large enough to permit running separate advertisements for perhaps hundreds of retailer-customers. And, obviously, the common advertisement could not state different prices for a single advertised product.

[18] It may be that the Commission would not even allow the supplier to obtain this necessary information from the wholesaler. In its Advisory Opinion Digest No. 143, the Commission advised that a plan "which requires a retailer located just outside one of the selected areas to show that he competes with one or more of the favored retailers in order to have the offer made available to him would appear to shift the responsibility of notification required under the statute. For this reason, the Commission cannot approve this particular provision of the plan should it result in discrimination against retailers located on the periphery of the selected trading areas." 3 CCH Trade Reg. Rep. ¶ 18,060 (September 12, 1967).

of such purchases, the nature of the customer's business, the type of program which the customer would find usable in that business, assure performance by the customer and obtain proof of performance. The cost to a supplier in performing these necessary tasks would obviously be so great as to counter-balance any benefits which might flow from the promotional allowances granted.[19] As in the case of the wholesaler, the only means available to the supplier to recoup these expenses would be by an increase in the cost of its goods.

Another and equally thorny problem which would be created if the supplier took it upon itself to deal with the wholesaler's retail customers directly would be that by so doing the supplier might well, under both Commission and court holdings, render such retailer-customers of the wholesalers its own "indirect" customers. Under the "indirect customer" doctrine, a retailer buying from a wholesaler, but having direct contacts with the supplier, is a "customer" of the supplier under the Robinson-Patman Act. See *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 709 (9th Cir. 1964); *American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104, 109-110 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962); *Kay Windsor Frocks, Inc.,* 51 F.T.C. 89, 95-96 (1954). Consequently, the ramifications in a supplier's engaging in such a course of direct dealing would extend beyond the immediate Section 2(d) problems. For, presumably, an indirect customer under 2(d) would also

[19] Retailers often purchase a given product from more than one wholesaler. Where this is true, the supplier's administrative burdens and costs would be multiplied correspondingly.

be considered an indirect customer for purposes of Section 2(a). If so, would not the supplier be responsible for assuring that its wholesaler's prices to such indirect-customers were non-discriminatory as compared with its own prices to direct-buying retailers?[20] Not only would this create a further imposition upon the independency of the wholesaler class, but it would again project the supplier into the *per se* illegal area of resale price maintenance.

Furthermore, the Commission's construction would, on its face, be impossible to apply in a chain of distribution which is more complex than the simple supplier-wholesaler-retailer setup. Merely adding another tier in the distribution process throws the Commission's concept completely awry. Where the supplier sells through a *jobber*-wholesaler-retailer distribution setup and also to direct-buying retailers, for example,—as is the case in many industries—Section 2(d) would, under the Commission's construction, apply to "discrimination" between the jobber and the direct buying retailer for both, under the Commission's interpretation, are engaged in the "distribution" of the supplier's goods. Obviously, though, the direct-buying retailer competes with neither the jobber nor with the jobber's customers.

Adoption of the Commission's construction might well spell the end of wholesalers in many industries.

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[20] *Cf., Purolator Products, Inc.* v. *Federal Trade Commission,* 352 F.2d 874 (7th Cir. 1965), petition for certiorari filed January 19, 1966; *General Auto Supplies, Inc.* v. *Federal Trade Commission,* 346 F.2d 311 (7th Cir. 1965), *cert. dismissed,* 382 U.S. 923 (1965); *Monroe Auto Equipment Co.* v. *Federal Trade Commission,* 347 F.2d 401 (7th Cir. 1965), *cert. denied,* 382 U.S. 1009 (1966).

Administration of a promotional program by a supplier which is required to deal with retail and wholesale customers on equal promotional and advertising terms would prove far too costly to make it worth the value received. Consequently, adoption of the Commission's construction would likely result in one of three wholly undesirable consequences, none of which Congress could have intended. Suppliers would be compelled to either cease offering cooperative promotional programs to customers, increase the prices of their goods in order to compensate for the increased costs of administering the cooperative promotional programs, or cease dealing through the wholesale distribution channel altogether.

Partially because of this latter consequence, the Antitrust Division of the Department of Justice has opposed enactment of measures which would have expanded Section 2(a) to compel suppliers to grant lower prices to wholesale customers than to retail customers.[21] The danger of such measures was stated by the Antitrust Division as follows:

> Indeed, enactment of these measures might spur supplier[s] to create an additional link in

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[21] E.g., H.R. 3465, 87th Cong., 1st Sess. (1961); S. 315, 86th Cong., 1st Sess. (1959). These measures were proposed, largely at the instance of wholesale interests, to revise statutory doctrine and overcome judicial decisions sanctioning sales to wholesale and retail customers at the *same* price. See *Bird & Son*, 25 F.T.C. 548, 553 (1957); *Klein* v. *Lionel Corp.*, 138 F. Supp. 560, 565 (D. Del. 1956), *aff'd*, 237 F.2d 13 (3d Cir. 1956). The avowed purpose of the measures—as in the Commission's proposed construction—was to make it possible for wholesalers to obtain prices that would permit them, in turn, to resell to their customers at prices comparative to those paid by direct-buying retailers. Congress rejected the measures and has declined to amend Section 2(a) to so expand the 2(a) definition of "discrimination." See Rowe, 101-103.

> the distribution chain to avoid the bills' application. This would naturally reduce the present function and profit of the wholesaler by forcing him to share it with another distribution class set up between him and the supplier. Again, the supplier may obviate even this measure by cutting off entirely the type of wholesaler or other middleman whose presence in his distribution setup makes for the legal thorn in his side. Thus, these measures might well harm the very distribution middlemen they seek to protect.[22]

The Commission's attempt to construe Section 2(d) as it here urges points up most vividly the dangers inherent in usurping the legislative function under the guise of interpretation. Under any proper analysis, the Commission's construction is clearly unworkable in application and operation and, we believe, incompatible with broader antitrust objectives and philosophy. Inasmuch as Congress did not see fit expressly to require suppliers to deal on equal promotional and advertising terms with functionally distinct customers —although it clearly knew how to do so as evidenced by the language of Section 2(a)—it cannot be assumed that such a construction was intended.

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[22] Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Functional Discounts, 86th Cong., 1st Sess. 43 (1959). The FTC took a similar position. E.g., Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Functional Discounts, 85th Cong., 2d Sess. 15 (1958), 86th Cong., 1st Sess. 17 (1959).

II. THE PRESENT RECORD PROVIDES NEITHER A PROPER NOR AN ADEQUATE BASIS FOR AN INFORMED RULING ON THE ISSUE PRESENTED

The construction of Section 2(d) here urged by the Commission would quite obviously have far-reaching effects in many segments of our nation's economy. A definitive determination of the issue by this Court, therefore, should be made only after a critical and thorough analysis of all pertinent facts and considerations. This, however, is not possible on the record of this case. The complaint did not raise the issue and, at the time evidence was taken, it appeared established that a 2(d) violation could not be based upon disproportionate promotional payments as between retailers and wholesalers.[23] Under the law at the time of trial, it was thus sufficient, where the alleged discrimination was between wholesale and retail customers, to establish only the fact that the customers involved occupied different functional levels in the distribution system and the matter was at an end. Accordingly, no evidence was adduced by either party going to the propriety of applying Section 2(d) to a "discrimination" between functionally distinct customers.

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[23] The complaint was issued on May 15, 1959 (R. 1-7). On September 9, 1959, while the instant case was in hearings, the Commission, in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-252 (1959), expressly declined to adopt the construction it now proposes. See also *Atalanta Trading Corp.*, 53 F.T.C. 565, 566, 573 (1956), *reversed on other grounds, Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F.2d 365 (2d Cir. 1958). See also Rowe, *Price Discrimination Under the Robinson-Patman Act*, 394 (1962), stating: "Essentially, while there is some uncertainty as to the precise competitive status of some intermediate distributors as compared with conventional wholesalers or retailers, the supplier must apportion promotional benefits only among distributors which are in geographic *and* functional competition with each other" (emphasis in original).

Some of the many factual and practical considerations relevant to the issue presented are pointed up in the preceding section of this brief. These considerations cannot be assessed in a vacuum; they require an evidentiary exposition of all critical factors in order to arrive at an informed conclusion. We therefore submit that the reasons which prompted this Court to decline to pass upon a *per se* application to vertical territorial limitations in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), dictates the same approach here. As in *White Motor,* "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [of their effect]. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . ." as to warrant classifying them as *per se* violations. *Id.* at 263.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

EDWARD F. HOWREY
HAROLD F. BAKER
TERRENCE C. SHEEHY
1707 H Street, Northwest
Washington, D.C. 20006

GEORGE W. MEAD
1211 Public Service Building
Portland, Oregon 97204

Attorneys for Respondents

Of Counsel:

HOWREY, SIMON, BAKER
& MURCHISON
1707 H Street, Northwest
Washington, D.C. 20006

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